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PT TRI PERKASA EXPRESS v. GREEN GLOBAL TRANSPORT SOLUTIONS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN J
[SUIT NO: WA-27NCC-45-09-2023]
19 MAY 2025

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Abstract – *(i) A plaintiff has the locus standi to claim for the surrender and delivery of containers from a third party who are holding the containers as a shipping agent for owners of ship liners where the prerequisites for the transfer of ownership stipulated in the settlement agreement between the plaintiff and the ship liner company are satisfied; (ii) General liens are exceptional in law and they only exist where expressly agreed or established by long standing customs and usage or recognised by law for certain profession or trade. In this case, the agency agreement entered into between the shipping agent and the ship liner company did not grant the shipping agent any contractual lien over any of the containers in its possession for any outstanding fees and disbursements that the ship liner company may owe to the shipping agent. There was no evidence establishing the existence of any usage in the industry in Malaysia that a lien is established whenever there is a balance of a general account in respect of shipping services rendered, including handling inward and outward containers and transshipments by shipping agents to owners of ship liners.*

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CONTRACT: *Agreement – Settlement agreement – Agreement between plaintiff and ship liner company to transfer shipping containers to plaintiff as settlement of loan sum – Plaintiff claimed for surrender and delivery of containers from defendant as shipping agent holding containers of ship liner company – Whether prerequisites for transfer of ownership stipulated in settlement agreement satisfied – Whether plaintiff had locus standi to claim for containers – Whether plaintiff acquired legal ownership of containers in possession of defendant – Whether defendant had general lien over containers – Whether defendant entitled to claim for agency fees, disbursement and storage charges incurred*

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CONTRACT: *Agreement – Agency agreement – Agreement between ship liner company and shipping agent for latter to provide shipping services, including handling inward and outward containers and transshipments – Plaintiff claimed for surrender and delivery of containers from defendant as shipping agent holding containers of ship liner company – Whether plaintiff had locus standi to claim for containers – Whether plaintiff acquired legal ownership of containers in possession of defendant – Whether defendant had general lien over containers – Whether defendant entitled to claim for agency fees, disbursement and storage charges incurred*

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PT Kaiso Global Maritim ('PT Kaiso'), an Indonesian company, operated a ship liner business providing shipping of cargo in containers along fixed routes. PT Kaiso also owned numerous containers for the use of its business. The plaintiff and the defendant had separate and independent business relationships with PT Kaiso. The plaintiff was PT Kaiso's customer and was also a lender of monies to PT Kaiso. The defendant, on the other hand, had an agency agreement with PT Kaiso to provide shipping services in Malaysia, including handling inward and outward containers and transshipments in consideration of payment of agreed agency fees and disbursements ('agency agreement'). Sometime between December 2021 to April 2022, PT Kaiso borrowed monies from the plaintiff in the total sum of RP (Indonesian Rupiah) 65 billion ('loan sum'). The plaintiff lent the monies to PT Kaiso provided the plaintiff was given preferential treatment on its freight forwarding services especially for the carriage of the plaintiff's goods to the Middle East. However, PT Kaiso defaulted on the loan sum, and this led to the plaintiff commencing a legal action against PT Kaiso to recover the unpaid loan sums ('Indonesian suit'). Following the Indonesian suit, PT Kaiso entered into a settlement with the plaintiff wherein PT Kaiso agreed to transfer its 977 shipping containers located in Indonesia and in other countries to the plaintiff as settlement of the loan sum ('settlement agreement'). The plaintiff and PT Kaiso recorded the settlement agreement before the court in the Indonesian suit ('Indonesian order'). About two months after the Indonesian order was made, PT Kaiso was wound up by one of its creditors ('winding-up order'). The plaintiff then took steps to trace the containers under the settlement agreement which were dispersed over Asia and the Middle East. The plaintiff had successfully retrieved 440 containers parked at Bestindo Central Depot and was in the process of retrieving 245 containers located in the Middle East. The balance of 292 containers ('containers') were located at Jambatan Merah Depot Sdn Bhd under the defendant's control. The plaintiff claimed that it had acquired legal ownership of the 292 containers currently in the possession of the defendant pursuant to the settlement reached between the plaintiff and PT Kaiso. The plaintiff demanded from the defendant for the surrender and delivery up of the containers but the defendant through its agent, one NAU Pte Ltd ('NAU'), claimed that the defendant had a lien on the containers for unpaid fees and disbursements owed by PT Kaiso under the agency agreement. The defendant also disputed the plaintiff's ownership claim over the containers. The defendant filed a counterclaim, seeking against the plaintiff the payment of USD 879,146.43 being the outstanding sums purportedly due and owing from PT Kaiso to the defendant together with various storage charges for the containers of PT Kaiso that the defendant had incurred. The issues that arose were (i) whether the plaintiff had become the legal owner of the containers by virtue of the settlement agreement; (ii) whether the plaintiff had any *locus standi* to claim for the containers based on the settlement agreement;

(iii) whether the defendant had any general lien over the containers; and (iv) whether the defendant was entitled to claim against the plaintiff the outstanding agency fees and disbursements owed by PT Kaiso and to charge the plaintiff for the storage charges incurred in respect of the containers.

Held (allowing plaintiff's claim; dismissing defendant's counterclaim):

(1a) The parties' principal objective under the settlement agreement was undoubtedly for the debt owed by PT Kaiso to the plaintiff in respect of the loan sum to be set-off and extinguished once PT Kaiso had transferred the ownership of the containers as identified in the agreement to the plaintiff. Article 3 of the settlement agreement stipulates that PT Kaiso would be released of its responsibility to make payment to the plaintiff once the terms as set out in art. 2 have been complied with. There was no dispute that by the time the plaintiff made the claims against the defendant, PT Kaiso had already treated its debt to the plaintiff as extinguished. There was no evidence that the said debt had remained in the books of PT Kaiso, and neither was there any evidence that the plaintiff had filed any proof of debt claims against the company in liquidation of the same. Thus, the prerequisites for the transfer of ownership stipulated in the settlement agreement have also been satisfied. (paras 41-43)

(1b) The information on the location and whereabouts of the containers constituted part of the 'supporting document' referred to in art. 2.2 of the settlement agreement. In art. 2, the reference to the 'handover of the containers' with the 'supporting documents' meant that the parties had contemplated not the physical delivery of the containers but instead constructive delivery of the same. When the plaintiff was provided with the information on the location of the containers, PT Kaiso would have done all that was necessary for the plaintiff to claim the delivery of the containers from the various third parties who were holding the containers as agents of PT Kaiso. With the serial numbers of the containers being specifically identified and listed in the settlement agreement and the information on the location of the containers, sufficient 'supporting documents' had been handed over to the plaintiff by PT Kaiso for the ownership of the containers to be transferred to the plaintiff. (paras 46-49)

(1c) The curator had recognised the plaintiff's ownership of the containers under the settlement agreement. As the curator, he would be duty-bound to recover, take possession of and vest in the estate all assets belonging to PT Kaiso. The fact that the curator did not challenge the plaintiff's action in retrieving the 440 containers in Jakarta and did not even list the containers in the settlement agreement as assets belonging to the estate necessarily suggested that the curator had indeed recognised ownership of the containers as belonging to the plaintiff. It

was not open to the defendant, being a total stranger to the settlement agreement, to challenge the plaintiff's ownership of the containers when the curator had, at the very least by inference, already acknowledged and recognised the plaintiff's ownership of the same. The plaintiff had legal ownership of the containers and indeed *locus standi* to claim against the defendant to surrender and deliver up the containers based on the settlement agreement. (paras 53-55)

(2) The agency agreement that was entered into between the defendant and PT Kaiso did not grant the defendant any contractual lien over any of the containers in the defendant's possession for any outstanding fees and disbursements that PT Kaiso may owe to the defendant. The defendant did not adduce any evidence at all establishing the existence of any usage in the industry in Malaysia that a lien is established whenever there is a balance of a general account in respect of shipping services rendered, including handling inward and outward containers and transshipments by shipping agents to owners of ship liners. General liens are exceptional in law, and they only exist where expressly agreed or established by long standing customs and usage or recognised by law for certain profession or trade. In this case, the defendant had not established that it had any general lien over the containers belonging to PT Kaiso under any agreement or law and/or under any established usage and/or custom at all. The defendant had no lien at all, be it general or specific over any of the containers claimed by the plaintiff. (paras 58, 66, 67, 68 & 69)

(3) There was no legal basis for the defendant to impose its claims under the agency agreement against PT Kaiso on the plaintiff who was a stranger to the agreement. The plaintiff had demanded from the defendant the delivery up of the containers, but this was refused by the defendant who had alleged that it had a lien over the same. That was a position taken without any legal basis at all. Up until the demand, the defendant had retained possession of the containers without even making any claims for storage charges against PT Kaiso and/or the curator. After the plaintiff had demanded for the containers, the defendant had continued to incur the storage charges for the containers. There was absolutely no merit to the defendant's claims against the plaintiff for the storage charges that it had incurred in respect of the containers, let alone for the storage charges in respect of the entire 690 containers. (paras 72-76)

(4) The plaintiff had discharged its burden of proof on the balance of probabilities in respect of its claims against the defendant. (para 77)

Case(s) referred to:
Kulkarni v. Manor Credit (Davenham) Ltd [2010] 2 All ER (Comm) 1017 ***(refd)***
Naylor v. Mangles [1794] 170 ER 295 ***(refd)***
R v. Ward Ltd v. Bignall [1967] 1 QB 534 ***(refd)***
Re Witt & Co ex parte Shubrook (1883) 23 Ch D 126 ***(refd)***
Spears v. Hartley [1775-1802] All ER Rep 181 ***(refd)***
Volkswagen Financial Services (UK) Ltd v. Revenue And Customs Commissioners [2018] UKFTT 663 ***(refd)***

For the plaintiff - Ng Sai Yeang, Noor Azanida Alladin & Maninder Pal Singh Pritipal Singh, PDK; M/s Raja, Darryl & Loh
For the defendant - Arun Kasi & Linda James; M/s Arun Kasi & Co

Legislation referred to:
Sale of Goods Act 1957, s. 19(1)

Sale of Goods Act 1979 [UK], s. 17

Reported by Suhainah Wahiduddin

JUDGMENT

Ong Chee Kwan J:

Introduction

[1] In a typical ship agency agreement, the agent handles various aspects of container and transhipment with responsibilities including documentation, customs clearance, logistics and managing relationships with the carriers and port authorities. In the process, the agent would come into possession containers belonging to its principal.

[2] In the present case, the defendant had an agency agreement with one PT Kaiso Global Maritim, an Indonesian company and pursuant 19 June 2025 to its performance of the services thereunder, the defendant had in its possession some 690 containers belonging to PT Kaiso Global Maritim which the defendant had arranged for storage with a third-party.

[3] The plaintiff claims that it has acquired legal ownership of some 292 containers of PT Kaiso Global Maritim currently in the possession of the defendant pursuant to a settlement reached between the plaintiff and PT Kaiso Global Maritim. Based on the aforesaid, the plaintiff sought for the delivery up of the said 292 containers from the defendant.

[4] The defendant refused to accede to the plaintiff's claims, asserting instead that the plaintiff has not acquired legal ownership of the 292 containers and that in any event the defendant has a general lien over the containers for outstanding fees and disbursements owed by PT Kaiso Global Maritim under the agency agreement.

[5] At the time the plaintiff made its claims to the defendant, PT Kaiso Global Maritim had been wound up, and its assets are currently administered by the curator appointed by the Indonesian court. The curator has disclaimed any legal and beneficial ownership over the 292 containers in the defendant's possession.

[6] In this action, this court has to determine if the plaintiff has indeed acquired the legal title to the 292 containers as claimed and whether the defendant has any general lien over the containers for the outstanding agency fees and disbursements owed by PT Kaiso Global Maritim. Further, the court has to examine the merits of the defendant's counterclaim against the plaintiff for the payment of the outstanding agency fees and disbursements owed by PT Kaiso Global Maritim under the agency agreement and the storage charges that the defendant incurred in respect of the containers.

Background Facts

[7] PT Kaiso Global Maritim ("PT Kaiso"), an Indonesian company, operated a ship liner business providing shipping of cargo in containers along fixed routes. PT Kaiso owned numerous containers for the use of its business.

[8] The plaintiff and defendant had separate and independent business relationships with PT Kaiso. The plaintiff was PT Kaiso's customer and was also a lender of monies to PT Kaiso. The defendant, on the other hand, had an agency agreement with PT Kaiso to provide shipping services in Malaysia, including handling inward and outward containers and transhipments in consideration of payment of agreed agency fees and disbursements ("the agency agreement").

[9] Sometime between December 2021 to April 2022, PT Kaiso borrowed monies from the plaintiff in the total sum of RP (Indonesian Rupiah) 65 billion (approximately USD (United States Dollars) $4 million) (the "loan sum"). The plaintiff lent the monies as PT Kaiso provided the plaintiff was given preferential treatment on its freight forwarding services especially for the carriage of the plaintiff's goods to the Middle East.

[10] However, whilst PT Kaiso had serviced some interest repayment, it did not pay the loan sum. Despite previous agreement to pay with interest on the loan sum, PT Kaiso defaulted, and this led to the plaintiff commencing a legal action against PT Kaiso *vide* Special Class 1A Court of South Jakarta Civil Suit No. 1068/PDT/G/2022/PN JKT SEL to recover the unpaid loan sums (the "Indonesian suit").

[11] Following the Indonesian suit, PT Kaiso entered into a settlement with the plaintiff on 7 December 2022 wherein PT Kaiso agreed to transfer its 977 shipping containers located in Indonesia and in other countries to the plaintiff as settlement of the loan sum ("the settlement agreement").

[12] On 13 December 2022, the plaintiff and PT Kaiso recorded the settlement agreement before the court in the Indonesian suit ("the Indonesian order").

[13] About two months after the Indonesian order was made, on 14 February 2023, one PT Intercon Terminal (one of PT Kaiso's creditors) wound up PT Kaiso in proceedings in Indonesia *vide* "Putusan Pengadilan Niaga pada Pengadilan Negeri Jakarta Pusat No: 51/Pdt.Sus-Pailit/2022/PN.Niaga.Jkt.Pst" (the "winding up order").

[14] The plaintiff then took steps to trace the containers under the settlement agreement which were dispersed over Asia and the Middle East. In this regard:

(i) the plaintiff has successfully retrieved 440 containers parked at Bestindo Central Depot, Jakarta which was held by the creditor, PT Intercon Terminal which according to the plaintiff was valued at approximately RP (Indonesian Rupiah) 10 billion (approximately USD (United States Dollars) 615,000);

(ii) the plaintiff also gave evidence that it was in the process of retrieving 245 containers located in the Middle East; and

(iii) the balance being 292 containers ("the containers") are located at Jambatan Merah Depot Sdn Bhd ("Jambatan Merah") under the defendant's control. The defendant also has at least 398 other containers belonging to PT Kaiso in its possession which do not come within the containers identified in the settlement agreement or relate to the plaintiff's claim herein.

[15] On 22 February 2023, the plaintiff demanded from the defendant for the surrender and delivery up of the containers but the defendant through its agent, one NAU Pte Ltd ("NAU") replied on 24 February 2023 claiming that the defendant has a lien on the containers for unpaid fees and disbursements owed by PT Kaiso under the agency agreement. The defendant also disputed the plaintiff's ownership claim over the containers.

[16] Given the defendant's dispute of the plaintiff's claims for the containers and with the view towards mitigating the plaintiff's losses arising from the non-use of containers and to avoid deterioration in their value, the plaintiff proposed to the defendant in April 2023:

(i) that the containers be sold pending resolution of the issues between the plaintiff and the defendant;

(ii) to pay the storage fees for the containers for a period between January 2023 until June 2023 or until the prompt sale of the containers; and

(iii) to pay the defendant a commission for the sale of the containers.

[17] Sometime on 26 May 2023, the curator of PT Kaiso wrote to inform the plaintiff that it has no claim to the containers and that the defendant is a mere creditor to PT Kaiso and that the defendant has been admitted as such, as of 30 March 2023 under the liquidation process.

[18] Notwithstanding the aforesaid, the defendant was not prepared to surrender the containers to the plaintiff. The defendant was also not agreeable to the plaintiff's proposal to sell the containers pending the resolution of the dispute. This led to the plaintiff filing the action herein.

[19] The defendant has continued to maintain its position even after the curator has confirmed that the containers do not form part of the assets of PT Kaiso and that the curator is not making any ownership claims over the containers under the liquidation administration of PT Kaiso.

[20] In fact, the defendant has filed a counterclaim seeking against the plaintiff the payment of USD879,146.43 being the outstanding sums purportedly due and owing from PT Kaiso to the defendant as of 31 December 202 together with various storage charges for the containers of PT Kaiso that the defendant has incurred since 1 January 2023.

[21] On 18 September 2024, the plaintiff's solicitors sought if the curator would offer evidence at this trial on its stand taken with regards to the containers. The curator had responded indicating that he had no interest in the action. The effect of the curator's absence at the trial is that whilst the curator had expressly confirmed in writing to the plaintiff that the containers do not form part of the assets of PT Kaiso for the liquidation administration, the curator has refrained from expressly acknowledging the plaintiff's claim as the legal owners of the containers.

Issues For Determination

[22] Arising from the above, the parties have put up the following legal issues for this court's determination:

(i) whether the plaintiff has become the legal owner of the containers by virtue of the settlement agreement;

(ii) whether the plaintiff has any *locus standi* to claim for the containers based on the settlement agreement;

(iii) whether the defendant has any general lien over the containers; and

(iv) whether the defendant is entitled to claim against the plaintiff for the outstanding agency fees and disbursements owed by PT Kaiso and to charge the plaintiff for the storage charges incurred in respect of the containers.

Court's Considerations

[23] The settlement agreement contained eight articles, the relevant articles of which are reproduced below:

A

Article 1

The Parties mutually acknowledge that the amount of the [PT Kaiso's] loan that shall be paid/returned back to the [Plaintiff] is Rp. 65,000,000,000.00 ... without taking into account the ongoing interest ...

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Article 2

2.1 The Parties mutually agree that *the realization of the payment/return of [PT Kaiso's] loan to the [Plaintiff] ... will be carried out by means of [PT Kaiso] handing over to the [Plaintiff] the containers belonging to [PT Kaiso]* ... 977 ... containers ... which is an integral and inseparable part of this Settlement *along with*

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the supporting documents.

2.2 The Parties mutually agree that *the handover of the containers ... along with the supporting documents* ... will be carried out/realized by the Parties at the latest 9 December 2022 *by making a separate minutes of handover ...*

Article 3

D

The Parties hereby mutually accept the terms of payment/return of the [Plaintiff]'s loan to [PT Kaiso] as determined in Article 2 of this Settlement so that the Parties to each other hereby mutually:

3.1 Waive the right to demand a recalculation of excess and/or the lack if payment/repayment of the [Plaintiff]'s loan to [PT Kaiso] according to

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this Settlement.

3.1 provide full endorsement, free and release of responsibility regarding the term of payment/return of the [Plaintiff]'s loan to [PT Kaiso] according to this Settlement:

Article 7

F

Regarding this Settlement Agreement ... and all its consequences, the parties hereby select a public and permanent domicile in the ... Court of South Jakarta.

Article 8

G

The Parties hereby request to the ... Court of South Jakarta ... to decide ... and sentence the [Plaintiff] ... and [PT Kaiso] to obey and carry out the content of this Settlement ... (emphasis added)

[24] The defendant contends that arts. 1 and 2 of the settlement agreement simply stipulate that PT Kaiso would 'hand over' the containers and in return

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for that the plaintiff would discharge the loan sum. There is nothing to suggest that the parties' intention was for the ownership of the containers to be transferred upon the execution of settlement agreement itself. In other words, the defendant contends that the settlement agreement was an agreement to do certain things *in futuro* rather than a deed of transfer of

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ownership of the containers. The agreement contemplates the provision of 'supporting documents' and the creation of 'separate minutes of handover'.

[25] The defendant contends that the transfer of legal ownership of the containers under the settlement agreement was never accomplished as PT Kaiso never delivered or handed over any 'supporting documents' for the containers at all and there was also no 'separate minutes of handover' as contemplated in art. 2.2.

[26] The defendant refers to PW1's testimony where he had agreed that the minutes of handover was important for the transfer of ownership, thereby acknowledging that PW1 had understood the ownership of the containers would be transferred only upon delivery of the same. In this regard, PW1 had agreed that the minutes of handover were never done:

AK: I will just first read 2.2 before we go into what's, how is that the parties are referenced there. "The parties mutually agree that the handover of the containers belonging to the First Party along with the supporting documents to the Second Party referred to in paragraph 2.1 of this article will be carried out realised by the parties at the latest 09/12/2022. By making a separate minutes of handover. That is what is stated there, right?"

SK: Yes.

AK: Ok. This means Kaiso should hand over the containers with supporting documents to Tri Perkasa by 09/12/2022. Right? … Correct?

SK: Yes.

AK: In 2.2, there's a further reference to separate minutes of handover, again, that is important for you to gain the ownership of the containers, correct?

SK: Yes.

AK: … My question was, the obligation of the Kaiso was to hand over the containers and a few other things, and the Kaiso never handed over the containers, agree?

SK: Agree.

…

AK: And Kaiso was also to provide a separate minutes of handover, that was never done, agree?

SK: Yes, agree, yes.

[27] PW1 also testified that he did not inquire about the interest of other persons over the containers at the time of the agreement because the transfer of ownership had not occurred:

AK: You did not ask Kaiso about other interested parties mentioned in the Article 4 because you know you had nothing to do with the ownership of the containers at that time? Agree, disagree?

SK: Setuju.

[28] The defendant further contends that the question as to when the ownership of the containers would be transferred to the plaintiff is to be determined based on the intention of the parties as would be the case in a typical sale and purchase transaction. Although the transaction between PT Kaiso and the plaintiff was not a sale and purchase transaction *per se*, it is contended that the principles concerning the transfer of ownership in a sale and purchase transactions would by analogy be of guidance here. Section 19(1) of the Sale of Goods Act 1957 ("SOGA") reads:

> (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

[29] In this regard, the defendant contends that ordinarily the intention will be for the ownership to transfer upon delivery. In *Kulkarni v. Manor Credit (Davenham) Ltd* [2010] 2 All ER (Comm) 1017, the English Court dealt with s. 17 of the UK Sale of Goods Act 1979, which is in *pari materia* with s. 19 of the Malaysian Sale of Goods Act 1957. The court affirmed the principle that:

> [20] … there is a contract for the sale of specific or ascertained goods, property in them is transferred at such time as the parties intend it to be transferred, and for these purposes regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case (see s. 17).
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> [43] … the agreement to sell would only mature into a sale, or purported sale, with actual delivery of the goods itself …

[30] Similarly, in *R v. Ward Ltd v. Bignall* [1967] 1 QB 534, the English Court stated that the governing rule lies in s. 17 of the Sale of Goods Act. The court noted that in modern commercial transactions, very little is required to infer that property in specific goods is intended to pass only upon delivery or payment:

> The governing rule, however, is in section 17, and **in modern times very little is needed to give rise to the inference that the property in specific goods is to pass only on delivery or payment.** (emphasis added)

[31] Based on the aforesaid above, the defendant contends that the fact that the curator did not consider the containers to be part of the assets of PT Kaiso in liquidation does not change the position as regards the owners of the containers are in law. This is especially since the curator has conspicuously refrained from expressly acknowledging the plaintiff's claim as owners of the containers and has refused to testify in support of the plaintiff's action herein.

[32] In this case, there is no doubt that the plaintiff's claim as the legal owner of the containers is premised on the settlement agreement. The Indonesian order merely records the terms of the settlement agreement.

[33] The question as to whether the plaintiff has obtained ownership of the containers under the settlement agreement is clearly a matter of construction of the document. In this regard, the defendant's contention that the settlement agreement ought to be construed as analogous to a sale of goods contract requires some consideration.

[34] As a start, the defendant concedes that the settlement agreement is not in fact a sale of containers by PT Kaiso to the plaintiff. However, the settlement agreement does involve the intention to transfer the ownership of the containers identified thereto in consideration of which there is an extinguishment of a monetary debt. To my mind, such an arrangement can indeed be treated as a contract for the sale of goods. There is after all an intention to transfer ownership of the containers for an agreed consideration. Thus, the general principles concerning the transfer of ownership in a sale and purchase transaction will be applicable absence any contrary evidence that the position is different under Indonesian laws.

[35] Accordingly, the question as to whether plaintiff has acquired ownership of the containers will have to be determined based on when the parties had intended the ownership of the same was to be transferred at the time the parties entered into the settlement agreement, which principle is supported by *Volkswagen Financial Services (UK) Ltd v. Revenue and Customs Commissioners* [2018] UKFTT 663 ("*Volkswagen Financial Services (UK) Ltd*"). In other words, what was the parties' intention at the time they entered into the settlement agreement as regards the moment when the ownership of the containers was to pass over to the plaintiff?

[36] In *Volkswagen Financial Services (UK) Ltd*, the tribunal considered the necessary conditions for ownership of goods to be deemed transferred in the context of an agreement between a lessor and lessee. The tribunal stated:

> [192] The first condition … is that the relevant agreement pursuant to which the goods are handed over must contain a 'clause expressly relating to the transfer of ownership of those goods from the lessor to the lessee'.
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> …
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> [193] The second condition … it must be clear from the terms of the contract, **as objectively assessed at the time when it is signed,** that ownership of the goods is intended to be acquired automatically by the lessee if performance of the contract proceeds normally, over the full term of the contract. (emphasis added)

[37] Based on the aforesaid, the defendant contends that based on the terms of the settlement agreement, the parties' intention when objectively assessed, was that the ownership of the containers would only be transferred upon PT Kaiso delivering to the plaintiff the 'supporting documents' and the 'minutes of handover' of the containers. Thus, since there was no delivery to the

A plaintiff of the 'supporting document' and also no 'minutes of handover' as stipulated in cl. 2.2 of the settlement agreement, there was no transfer of any legal ownership of the containers to the plaintiff and by reason of the same, the plaintiff's claims against the defendant for the delivery of the containers are simply unsustainable.

B **Plaintiff's Ownership Of Containers**

[38] At the outset, it must be noted that the curator of PT Kaiso has not disputed the validity and/or challenged the terms of the settlement agreement, the Indonesian suit and the Indonesian order which formed the basis upon which the plaintiff has made its claims of ownership over the C containers.

[39] There is no dispute that PT Kaiso owned the containers at the time of the settlement agreement and that by the settlement agreement, PT Kaiso had intended for the ownership of the containers to be transferred over to the D plaintiff as consideration towards the settlement of the loan sum.

[40] Although the plaintiff's attempt to secure the attendance of the curator to enable his oral evidence to be led was unsuccessful as the curator had declined, the authenticity of the curator's communication with the parties was not disputed as they were admitted as Part B documents. In this regard, E it is not without significance that the defendant never challenged the position taken by the curator in his communication at all.

[41] To my mind, the parties' principal objective under the settlement agreement was undoubtedly for the debt owed by PT Kaiso to the plaintiff in respect of the loan sum to be set-off and extinguished once PT Kaiso has F transferred the ownership of the containers as identified in the agreement to the plaintiff. Towards this end, the intention could only be that PT Kaiso's ownership of the containers would have to be transferred to the plaintiff before and/or at the latest at the time when the debt owed by PT Kaiso to the plaintiff is treated as extinguished. This is clear from art. 3 of the G settlement agreement which stipulates that PT Kaiso would be released of its responsibility to make payment to the plaintiff once the terms as set up in art. 2 have been complied with. Put it differently, at the very latest, by the time the debt is deemed extinguished by PT Kaiso, legal ownership of the containers would have passed.

H **[42]** In this regard, there can be no dispute that by the time the plaintiff made the claims against the defendant, PT Kaiso had already treated its debt to the plaintiff as extinguished. There is no evidence that the said debt had remained in the books of PT Kaiso and neither is there any evidence that the plaintiff had filed any proof of debt claims against the company in liquidation I for the same. The fact that the curator of PT Kaiso had confirmed that the containers are not even listed as asset of the liquidation further this analysis.

[43] In fact, to my mind, the prerequisites for the transfer of ownership stipulated in the settlement agreement have also been satisfied. With regard to the 'supporting documents' referred to in art. 2.1, these would be such documents that the plaintiff considers as sufficient for the plaintiff to rely upon as support when asserting its ownership of the containers against third parties who are in possession of the containers. Quite clearly, the parties were not intending that the ownership of the containers would only be transferred upon the physical delivery of the containers as art. 2.2 had expressly provided for the handover to be completed with the delivery of the 'supporting documents' by 9 December 2022. It cannot be disputed that physical delivery would not have been possible by 9 December 2022 and for this reason could not have been intended by the parties.

[44] Contrary to the defendant's contentions that there was no transfer of ownership of the containers because there were no 'supporting documents' furnished as provided for in the settlement agreement, PW1 had testified that the 'supporting documents' were in fact the list of containers with their corresponding serial numbers which was attached to the settlement agreement. This was what PW1 testified:

JUDGE I know but what are these supporting, what constitutes supporting documents? Maybe you want to establish that first before we ask the next question as to whether it's before us or not, yes.

AK Very well, My Lord. The obligation of Kaiso was to hand over the containers with supporting documents. What were the supporting documents? What does that mean?

TRANSL Ok, so Kaiso has to give him a list of containers and the numbers of the containers, ok. Then that is his reference in (..01:09:42) settlement.

AK The list of containers and number are already annexed to the agreement, correct?

SK Yes, correct.

AK So, that is not the supporting document to come together with the handover?

SK I feel that is enough. *To my knowledge, that is enough as the numbers on the containers are there. That means those are the documents that belong to them, which should be given to him. The numbers of the containers, they are on containers list, so according to his lawyer, that is enough as, for him.* (emphasis added)

[45] Further, PW1 also testified that subsequent to the settlement agreement, PT Kaiso had also provided the plaintiff with information on the exact locations of the containers:

A SK During the Court settlement, I asked of the whereabouts, the location of these containers. Kaiso informed that, so these containers are found in Indonesia and some places, Malaysia, Middle East, maybe in Singapore. But they did not inform me the exact location which, they just informed of him, informed him that where are the whereabouts and which country but they did not
B inform which depot or which agent. But they will inform immediately the location, the more accurate location, they will inform him the accurate location. But we tried contacting them. January, no response. **Only in February, they got back to him, telling him of the exact locations of the containers.**

(emphasis added)

C

[46] To my mind, the information on the location and or whereabout of the containers also constitute part of the 'supporting document' referred to in art. 2.2 above. As alluded to above, when one looks at art. 2, the reference to the 'handover of the containers' with the 'supporting documents' to my
D mind means that the parties had contemplated not the physical delivery of the containers but instead constructive delivery of the same.

[47] The contention of the defendant that physical delivery of the containers was contemplated could not have been intended because at all material times, the containers were not in the possession of PT Kaiso at all
E but were in the custody, possession and control of its agents in various parts of the world. In this regard, given that the settlement agreement had expressly stipulated for the 'handover' to be performed by 9 December 2023, it could not have been intended by the parties that ownership was only to be transferred upon the physical delivery of the containers.

F **[48]** The absence of any 'minutes of handover' referred to in art. 2.2 to my mind does not change the fact that the ownership of the containers had already been transferred. This is because the 'minutes of handover' constitutes merely a record or confirmation that the handover of the 'supporting documents' had been performed. In this regard, there is no
G evidence of any disputes between PT Kaiso and the plaintiff that the 'supporting documents' had been handed over. Accordingly, the absence of any such 'minutes of handover' in this case is a non-issue.

[49] Thus, in my judgment, when the plaintiff was provided with the information on the locations of the containers, PT Kaiso would have done
H all that was necessary for the plaintiff to claim the delivery of the containers from the various third parties who were holding the containers as agents of PT Kaiso. With the serial numbers of the containers being specifically identified and listed in the settlement agreement and the information on the locations of the containers, sufficient 'supporting documents' had been
I handed over to the plaintiff by PT Kaiso for the ownership of the containers to be transferred to the plaintiff.

[50] This is the reason why the containers do not form any part of the assets of the estate of PT Kaiso under liquidation and correspondingly the debt owed by PT Kaiso to the plaintiff is extinguished. This is also why PT Kaiso's (through the curator) official position is that it no longer claims legal ownership over the containers. This necessarily means that the legal ownership of the containers has been transferred by PT Kaiso. This also explains why the plaintiff no longer makes any claim against the estate of PT Kaiso for the repayment of the loan sum.

[51] There is also no dispute and indeed no evidence tendered before this court that apart from the plaintiff, there are other third parties claiming ownership of the containers.

[52] In fact, the above also explains why the plaintiff has successfully retrieved 440 containers parked at Bestindo Central Depot, Jakarta which was held by the creditor, PT Intercon Terminal. If the ownership of the containers has not been transferred to the plaintiff, the curator would have challenged the plaintiff's right to claim the same.

[53] It must be inferred from the combination of the aforesaid above that the curator has recognised the plaintiff's ownership of the containers under the settlement agreement. As the curator, he would be duty-bound to recover, take possession of and vest in the estate all assets belonging to PT Kaiso. The fact that the curator did not even challenge the plaintiff's action in retrieving the 440 containers parked at Bestindo Central Depot in Jakarta and did not even list the containers in the settlement agreement as assets belonging to the estate necessarily suggest that the curator has indeed recognised ownership of the containers as belonging to the plaintiff.

[54] In the light of the aforesaid, it is not open to the defendant being a total stranger to the settlement agreement to challenge the plaintiff's ownership of the containers when the curator has, at the very least by inference, already acknowledged and recognised the plaintiff's ownership of the same.

[55] In the premises, it is the judgment of this court that the plaintiff does have legal ownership of the containers and indeed *locus standi* to claim against the defendant to surrender and deliver up the containers based on the settlement agreement.

Whether The Defendant Has A Lien On The Containers

[56] The defendant claims that it had provided services to PT Kaiso, and for the services rendered, PT Kaiso owed the defendant the sum of USD879,146.43 (due as of 31 December 2022), as well as RM227,237 (for storage costs from 1 January 2023 to 11 August 2023). The storage costs continue to accrue.

[57] The defendant maintains in this action that it has a lien over the containers which it can exercise to recover the outstanding fees and the storage charges incurred. If the plaintiff is the legal owner of the containers, then the defendant contends that the plaintiff is obliged to pay for the outstanding fees and storage charges.

[58] However, the agency agreement that was entered into between the defendant and PT Kaiso does not grant the defendant any contractual lien over any of the containers in the defendant's possession for any outstanding fees and disbursements that PT Kaiso may owe to the defendant. Neither is there any provision entitling the defendant to claim against PT Kaiso for storage charges incurred for the containers.

[59] Indeed, it is not in dispute that the defendant never claimed against PT Kaiso that it has a lien over the containers that are in its possession by reason of the agency agreement. The defendant only asserted a right of lien to PT Kaiso after the plaintiff filed the present action against the defendant.

[60] In fact, the defendant has registered its claims for the unpaid outstanding fees and disbursements under the agency agreement to the curator and by proving its claim in the liquidation and awaiting payment of the dividend therefrom, it must be taken that the defendant is not asserting any lien over the containers *vis-à-vis* the curator of PT Kaiso.

[61] Notwithstanding that there is no contractual provision creating a lien, the defendant contends that the outstanding fees for services rendered together with the storage charges owed by PT Kaiso constitute 'general account' balances which under 'the industry practice and common sense' gives rise to a right to retain the containers. In his evidence in chief, DW1 testified as follows in Q/A 14 of WS DW1:

> (c) The practice of the Defendant was something common in the industry, and *a simple common sense will tell that no agent will release the assets of a liner who owes monies for services provided by the agent,* more so when not only fees but also reimbursement of disbursements was owed.
>
> (d) *This being the industry practice, it must have been well known to PT Kaiso at all material times.* (emphasis added)

[62] According to the defendant, it is trite that a party may exercise a general lien over goods in its possession as security for a general balance of account when the industry practice, through usage or custom, is to retain the goods in possession for the general balance beyond the specific balance relating to the goods. The defendant contends that the existence of this industry practice, which is said to be based on common sense here, was not crossed or otherwise challenged by the plaintiff.

[63] The defendant referred to *Re Witt & Co, ex parte Shubrook* (1883) 23 Ch D 126 where the court had upheld a claim of general lien by a firm of packers, Perrott & Perrott, who were regularly engaged to pack goods for shipment. When the debtors went into liquidation, the packers retained possession of certain goods and claimed a general lien over them for charges not only in relation to those specific goods, but for earlier unpaid services. In affirming the lien, the court cited the judgment of Lord Hardwicke in *Ex parte Deeze* and observed:

> Affidavits were made by two persons engaged in the trade of packers to the effect that by the *custom of trade a packer has a general lien upon the goods of his customers in his possession for the amount of his charges, not only in respect of the particular goods, but also in respect of any other goods of the customer.* …
>
> I think it is too late now to attempt to set aside that which has been considered law for so many years, and I must say I do not see the injustice of it. I agree with what Lord Hardwicke said in *Ex parte Deeze* (2); it seems to me to be very good sense and justice. *A man has goods in his possession which he has received in the ordinary course of trading, and he is asked to deliver them up, and at the same time he has a claim against the person who asks him to deliver them up. I think he has a perfect right to keep them.* Under the Judicature Acts, I think, if an action were brought for the goods in trover or detinue, by means of a counterclaim the whole matter might be settled in one action. *I certainly think this law with regard to lien is a very proper one;* it has been settled for a great many years, and I do not see why we should endeavour to limit the effect of the decisions. (emphasis added)

[64] It is further contended by the defendant that the principle that traders may exercise a lien for a general balance of accounts, when the industry practice is to retain any goods of the debtor for a general balance of accounts, is well established in law, referring to *Naylor v. Mangles* [1794] 170 ER 295 and *Spears v. Hartley* [1775-1802] All ER Rep 181.

> *Naylor v. Mangles:*
>
> Boyne was in debt to the defendant to the amount of £167, part of which only was for the charges of these twenty-five hogsheads of sugar; *the remainder was for the balance of a general account, for which the defendant claimed a lien and refused to deliver them to the plaintiff till the whole sum was paid.*
>
> … Whether a wharfinger had a lien for the balance of a general account upon the goods in his possession?
>
> … Lord Kenyon said, *liens were either by common law, usage, or agreement.* … That *a lien from usage was matter of evidence.* The *usage in the present case had been proved* … it should be considered as a settled point, that *wharfingers had the lien contended for.*
>
> – per Lord Kenyon.
>
> *Spears v. Hartley*

A The defendant was a wharfinger, and claimed a lien on the log of mahogany, as well for the wharfage as for the *balance of a general account,* which balance was due in 1790, under which lien he justified a right to retain it.

Serjeant Best (with him Reader) for the plaintiff contended that, admitting the
B *defendant might claim a lien for the wharfage due on a particular article, he was not entitled to such lien for the balance of a general account.*

Lord Eldon CJ, *referring* to *Naylor v. Mangles* (1) said: It has been ruled by Lord Kenyon that a *wharfinger has a lien for the balance of a general account,* and considered as a point completely at rest. I shall, therefore, hold it as
C the settled law on the subject, that he has such a lien as is claimed in the present case.

If the creditor obtains possession of goods on which he has a lien for a *general balance,* he may hold them for that demand by virtue of the lien. In this case the defendant had a subsisting demand when the goods came to his possession, and I am of opinion he may enforce it by the lien which
D the law has given him for his general balance.

- per Lord Eldon CJ (emphasis added)

[65] Both the cases in *Naylor v. Mangles* and *Spears v. Hartley* cited by the defendant involved claims by a wharfinger of a lien for the balance of a
E general account. In the former case, evidence was tendered to show that a wharfinger has a lien for the balance of a general account by usage. This was accepted as established in the latter case after referring to Lord Kenyon's ruling in *Naylor v. Mangles*.

[66] However, in the present case, the defendant did not adduce any
F evidence at all establishing the existence of any usage in the industry in Malaysia that a lien is established whenever there is a balance of a general account in respect of shipping services rendered, including handling inward and outward containers and transhipments by shipping agents to owners of ship liners.

G **[67]** Indeed, apart from a mere averment made in his evidence in chief, the defendant has not shown the existence of any such usage or customs. An assertion that the existence of a general lien would accord with common sense simply does not pass muster. There was also no mention of such usage and or customs in the agency agreement. In this regard, the fact that art. 1.04
H of the agency agreement makes a reference to the 'practice' of the principal and agent relationship adds nothing to the defendant's case. The fact was there is no evidence that PT Kaiso was given any notice of such usage and or custom.

[68] General liens are exceptional in law, and they only exist where
I expressly agreed or established by long-standing customs and usage or recognised by law for certain profession or trade. In this case, the defendant has not established that it has any general lien over the containers belonging to PT Kaiso under any agreement or law and or under any established usage and or custom at all.

[69] Accordingly, it is my judgment that the defendant has no lien at all, be it general or specific over any of the containers claimed by the plaintiff in this case.

Defendant's Right To Claim Storage Charges

[70] During DW1's cross-examination, DW1 testified that the defendant has in its possession 690 containers belonging to PT Kaiso. These included the containers claimed by the plaintiff.

[71] By its counterclaim, the defendant claims that if the plaintiff is the legal owner of the containers, then the plaintiff is obliged to pay the defendant for the storage charges which the defendant has incurred for all the 690 containers currently stored with Jambatan Merah. These containers have been with the defendant since July 2022. The aforesaid claim is made notwithstanding that the plaintiff is only seeking the delivery up of the containers totalling only 292 containers. This is clear from DW1's following testimony:

NZA Very well, I will withdraw that. Mr Sarath, are you aware that the claim here by the Plaintiff is only for 292 containers?

SARATH Yes.

NZA Can you … would you be able to agree with me that the invoices that you raised here, at the first part, in the total of USD874K is for services charged on more than 292 containers?

SARATH Yes, correct.

NZA Can you… would you also able to agree with me that the invoices raised by Jambatan Merah of the storage charges are also for the cost of storage of more than 292 containers?

SARATH Yes.

…

NZA I'll rephrase. Mr Sarath, do you agree with me that the services provided to the… the services provided which then led to the amount of USD874K are also for the balance 398 containers that is stored with Jambatan Merah?

SARATH Yes, and can I add? Not only these containers, we loaded many containers to many locations. So, these charges are for those containers also.

NZA So, your evidence is that the charges incurred under the invoice as well as storage charges by Jambatan Merah is more, is not just… is not confined to 292 but more than that?

SARATH Yes, correct. And these containers are not under our custody. These containers are already loaded from 2022 July till 2022 December.

A NZA Thank you, Mr Sarath. That when you said that it's already been loaded, then when you send it to the storage of Jambatan Merah, do you agree with me that it's the decision of Green Global to keep the containers?

SARATH Yes.

B NZA So, do you agree with me that the storage cost then is incurred because Green Global chose to keep the containers?

SARATH We're forced to.

NZA Therefore, Mr Sarath, can you agree with me that the storage cost by this Jambatan Merah is to be paid by Green Global or C PT Kaiso?

SARATH PT Kaiso.

[72] With respect, there is no legal basis for the defendant to impose its claims under the agency agreement against PT Kaiso on the plaintiff who is D a stranger to the agreement. Indeed, DW1 had acknowledged during cross-examination that the defendant's claims under the agency agreement ought to be made to PT Kaiso and or to the curator:

NSY Alright, you have no connection. That's accepted, yes. So, you say you have no connection with the Plaintiff. So, the Plaintiff, E insofar as Green Global is concerned, is not in any way related to the services under the agency agreement.

You would agree?

PK Once again, Ma'am.

F NSY Because you say you have no connection with the Plaintiff, you would agree that all the services performed under the agency agreement for PT Kaiso has nothing to do with the Plaintiff. Yes?

PK Yes.

G NSY And therefore, you would agree that your claim under the agency agreement is as against the Curator and PT Kaiso. Yes?

PK Yes.

NSY And it would be up to the Curator to pay Green Global. Yes?

H PK Yes.

[73] In truth, the defendant has no legal basis to claim the storage charges for the containers under the agency agreement at all. In fact, when asked if the defendant has made any claim to PT Kaiso and or the curator in respect of the storage charges for the 690 containers currently in the defendant's I control and possession, DW1 testified that the defendant had not done so.

NSY Ok. So, my question to you is that you were aware that 292 were claimed by PT Tri Perkasa. My question to you is, you are also aware that no one else had claimed for the 398. I am just asking you about the 398. And I just want to know whether you have asked the Curator to pay the storage for these 398?

PK We have not.

...

JUDGE Question asked by counsel is whether insofar as the 398 containers storage charges incurred were demanded or charged to the Curator.

NSY I am grateful, My Lord.

PK Can I explain, sir?

JUDGE No. Yes or no first.

PK No.

NSY Yes. Thank you. And whilst you are saying that you are holding the containers on a lien, would you agree with me that you have not informed the Curator that you are imposing charges for the storage? That's my question. You have not informed them that you are imposing charges on the storage?

PK Container has to stay, the storage charges will increase.

NSY No. My question is, you did not notify the Curator that you are incurring charges and you (inaudible) – (52.25 – 17.1.2025)

PK Not specifically.

[74] In the present case, the plaintiff had on 22 February 2023 demanded from the defendant the delivery up of the containers, but this was refused by the defendant who had alleged that it had a lien over the same. That is a position taken without any legal basis at all.

[75] Up until the demand, the defendant had retained possession of the containers without even making any claims for storage charges against PT Kaiso and/or the curator. After the plaintiff had demanded for the containers, the defendant has continued to incur the storage charges for the containers only because the defendant has insisted that it has a lien over the same when there is in law no legal basis.

[76] Accordingly, it is the judgment of this court that there is absolutely no merits to the defendant's claims against the plaintiff for the storage charges that it has incurred in respect of the containers let alone for the storage charges in respect of the entire 690 containers.

A

Conclusions

[77] Accordingly, it is the judgment of this court that the plaintiff has discharged its burden of proof on the balance of probabilities in respect of its claims against the defendant and by reason thereof this court makes the following orders:

B

(i) a declaration that the plaintiff is the legal and beneficial owner of the 292 containers, which details are as set out in Annexure A of the writ and statement of claim;

(ii) a declaration that the plaintiff is entitled to the possession of and to
C the return of the 292 containers, which details are as set out in Annexure A of the writ and statement of claim;

(iii) a declaration that the defendant has no right, interest, title or authority to hold and/or detain the 292 containers, which details are as set out in Annexure A of the writ and statement of claim;

D

(iv) an injunction prohibiting and restraining the defendant and or its agents and assigns from dealing with and/or disposing and/or transferring the 292 containers, which details are as set out in Annexure A of the writ and statement of claim;

E (v) the defendant to take steps and within 14 days from the date of the order made herein, do deliver up and/or cause to be delivered up the 292 containers, which details are as set out in Annexure A of the writ and statement of claim, to the plaintiff or its servants or agents, and/or as instructed by the plaintiff, or its servants or agents and that
F the plaintiff is entitled to take physical possession thereof without obstruction, condition or demand, whether monetary or otherwise;

(vi) an order that the defendant pays the plaintiff damages to be assessed before the Registrar of the High Court, arising out of and premised on the defendant's unlawful possession and detention of the 292
G containers, which details are as set out in Annexure A of the writ and statement of claim, and interest on the amount of the damages assessed at the rate of 5% per annum from the date of judgment to the date of full realisation, to be assessed within 45 days from the date of the order made herein;

H (vii) that the plaintiff be at liberty to apply for such directions and relief and/or extension of time to give effect to the orders made herein and of the plaintiff's rights, interests and entitlement to the 292 containers, which details are as set out in Annexure A of the writ and statement of claim; and

I

(viii) the defendant to pay the plaintiff cost of this action fixed at RM50,000 subject to the payment of allocator.

[78] The defendant's counterclaim is dismissed.